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No. 94-46

In The

Supreme Court of the United States

October Term, 1994

CLEMENT BERNARD,

Petitioner,

vs.

CITY OF DALLAS,

Respondent.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Fifth Circuit

RESPONDENT'S BRIEF IN OPPOSITION

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QUESTIONS PRESENTED

1. Should this Court grant a writ of certiorari where the Fifth Circuit Court of Appeals has correctly applied this Court's standards on whether an individual has suffered actionable racial harassment and whether the Respondent took immediate and corrective action?

2. Should this Court grant a writ of certiorari where the Fifth Circuit Court of Appeals has correctly applied this Court's standard on whether an individual has suffered racial discrimination in promotions?

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RESPONDENT'S BRIEF IN OPPOSITION

TO THE UNITED STATES SUPREME COURT:

The City of Dallas ("City") files this Brief in Opposition to this Petition for Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit ("Response"), asking this Court to deny the Petition for Writ of Certiorari ("Petition") to review the opinion issued on April 7, 1994, by the United States Court of Appeals for the Fifth Circuit. In support of this request, the City respectfully shows the Court as follows:

JURISDICTION

The Court's jurisdiction of this appeal is based on the judgment and opinion of the Fifth Circuit Court of Appeals entered on April 7, 1994. This Court has jurisdiction to review the judgment of the Fifth Circuit under 28 U.S.C. §1254(1).

STATEMENT OF THE CASE

A. Course of Proceedings and Disposition in Court Below

Petitioner Clement Bernard (Bernard) filed this case on July 31, 1990, claiming the Respondent City of Dallas (City) had discriminated against him in violation of 42 U.S.C. §2000(e) *et seq.* (Title VII). Petitioner claimed he suffered racial discrimination because he was denied training in trying to achieve a promotion, he was retaliated for having filed an Equal Employment Opportunity Commission (EEOC) charge, and he claimed he was a victim of a hostile racial environment.

Respondent filed a Motion for Summary Judgment on April 2, 1993. On June 23, 1993, the district court granted the Respondent's motion on all issues. The district court specifically held that Bernard had failed to establish a *prima facie* case of disparate treatment with respect to promotions. As to the hostile work environment, the district court held that Bernard had failed to meet the hostile work environment standard set out in

Rogers v. EEOC.[1] The district court also ruled that Bernard had failed to show any adverse employment action to support his allegation of retaliation.[2]

Bernard filed a timely appeal, and on April 7, 1994, the Fifth Circuit issued its decision. Although the Fifth Circuit's analysis differed from the district court on the issue of hostile work environment, it affirmed the granting of summary judgment.[3] On the promotional issue, the appeals court agreed with the district court and held that Petitioner did not present sufficient evidence of any racial animus in his claim that he suffered discrimination in his attempts to be promoted to the rank of T-9 Instrument Technician. The circuit court held that Bernard did not pass the required promotional exam, and thus did not adduce sufficient evidence to create a genuine fact issue concerning this claim. This holding is consistent with this Court's previous decisions and the decisions of the other circuits.

On the issue of a hostile work environment, the Fifth Circuit held that while the circumstances imply that a hostile working environment may have existed, the evidence showed that management took prompt remedial action when informed that Bernard found any conduct offensive. The circuit court held that management's handling of the situation after Bernard complained never

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[1] 454 F.2d 234 (5th Cir. 1971), *cert. denied*, 481 U.S. 957 (1972). *See, Clement Bernard v. City of Dallas*, No. 90-1783, Memorandum Opinion and Order (N.D. Tex. June 23, 1993).

[2] Petitioner has not appealed the issue of retaliation.

[3] *See Clement Bernard v. City of Dallas*, No. 93-1651 (5th Cir. April 7, 1994).

suggested that any of the alleged offensive conduct was tolerable or excusable, nor did management ever advise Bernard to ignore the behavior. The circuit court ruled that management's uncontroverted actions constituted a prompt remedial response to Bernard's complaint. This holding is consistent with this Court's previous decisions and the decisions of the other circuits.

B. Statement of Facts

On March 12, 1986, Bernard, an African-American male, began working as an Apprentice Water Instrument Technician T-7 at the Southside Wastewater Treatment Plant's Instrument Section (SSWWTP) for the Dallas Water Utilities (DWU). Harry B. Ketter (Ketter), a white male, was also an employee of DWU. Ketter was hired as a Water Instrumentation Technician T-9 on December 10, 1980 by DWU. In September 1987, Bernard was assigned to work with Ketter. At no time during Bernard's employment with DWU did Ketter have the authority to fire, promote or otherwise directly affect Bernard's employment. R. pp. 111, 212.

In October 1988, Bernard verbally complained of Ketter for the first time to Ted Kilpatrick, SSWWTP Manager. The verbal complaint involved ongoing disagreements Bernard had with Ketter, allegedly regarding race, politics and religion. Bernard alleged that Ketter had made derogatory statements concerning his race. Bernard further alleged Ketter had posted derogatory drawings and pictures at the SSWWTP on the walls of the Instrument Section work area. Ted Kilpatrick immediately directed Don Perez, SSWWTP Assistant Manager, to investigate

the incidents, and to monitor the employees of the Instrument Section for inappropriate activities. R. pp. 44, 213. Approximately one week later, Perez reported to Kilpatrick that he had counseled with Ketter and Bernard, and each party was committed to going forward and working harmoniously. R. pp. 44-45. As plant manager, Kilpatrick also had a long standing policy of maintaining the work place free of inappropriate literature. The investigation did find some pictures of a sexual and religious connotation and Kilpatrick ordered that they be removed immediately. R. pp. 116-118. On December 14, 1988, Kilpatrick met with Bernard to determine the status of his grievance. According to Bernard, the concerns expressed in the complaint were resolved. R. p. 126.

On or about December 22, 1988, Kilpatrick held a counseling session with Bernard, Ketter and Don Pierce, a white male, who then was the supervisor of both Bernard and Ketter. Kilpatrick again discussed his policy of maintaining the work place free of inappropriate literature and the responsibility of each employee to work cooperatively. All three pledged that they would work cooperatively in the work place. Also, on December 22, 1988, Kilpatrick conducted a separate counseling session with Pierce concerning his responsibilities in overseeing the Instrumentation Group. Kilpatrick directed Pierce to monitor the employees and document any misconduct. R. pp. 127-128, 214.

On December 28, 1988, Bernard again verbally complained with Kilpatrick. Bernard alleged that the incidents of harassment by Ketter were continuing. In response Kilpatrick directed that another investigation be conducted. On or about January 9, 1989, Kilpatrick

ordered that the Instrument Section be reorganized and that Bernard and Ketter be assigned to different areas of the plant and to not work together. Kilpatrick also ordered that Ketter not be left in charge as acting supervisor should the supervisor Pierce not be on duty. Within three months of Bernard's original complaint, Kilpatrick took decisive action by removing Ketter from any position with authority. Bernard did not appeal Kilpatrick's response to his complaint. R. pp. 121-125, 214.

Bernard alleged racial discrimination and/or intimidation on January 23, 1989 in his first EEOC complaint (#310-89-0858). The EEOC determination on these charges found that there was no evidence that Bernard was ever denied proper training because of his race. More specifically, no evidence existed that Bernard was denied training received by other employees. The EEOC determination also concluded that the City of Dallas took prompt remedial action once made aware of harassment by a fellow employee, and that no additional relief was necessary. R. pp. 85-87.

Dallas Water Utilities management had a longstanding policy of maintaining all work areas free of inappropriate literature. Each incident involving inappropriate literature was investigated promptly, and the responsible employee was disciplined accordingly. Ketter was disciplined each time he was found to have violated that policy. On or about December 9, 1988, Kilpatrick discovered several Playboy-type magazines in Ketter's desk area. Kilpatrick confiscated these magazines and verbally reprimanded Ketter for having inappropriate material in the work place. R. p. 216. When questioned about the magazines, Ketter acknowledged he had read the magazines, but denied ownership. Ketter

received written reprimands for possessing inappropriate literature in the workplace on March 21, 1989, and again on August 8, 1989. R. pp. 130, 216. After counseling sessions proved unsuccessful, Kilpatrick ordered the permanent transfer of Ketter from SSWWTP in September, 1989. R. pp. 131, 216.

Bernard took the Water Instrument Technician T-9 exam on four occasions. The first occasion was on May 1, 1987. (Prior to being assigned to work with Ketter.) Bernard failed the exam on all four occasions. R.p. 99. Bernard did take and pass the Mechanic Technician T-9 exam. Bernard received tutoring assistance to pass this exam from Jessie Beard, a white male supervisor. Bernard testified that he would not have passed this exam without the assistance of Beard. R. pp. 81-83.

On July 31, 1990, Bernard filed this lawsuit against Defendant City of Dallas alleging racial discrimination in training, racial harassment and retaliation under 42 U.S.C. §2000(e). R. pp. 3, 7.

SUMMARY OF THE ARGUMENT

The Fifth Circuit's decision in the present case does not warrant review by this Court because the appeals court decision correctly applies this Court's precedent and applicable law, and there is no conflict among the circuits. The Fifth Circuit applied the proper standard by finding that Respondent's actions constituted a prompt remedial response each and every time they were notified

of alleged offensive conduct. Within three months of Bernard's first complaint to management, Ketter was transferred to another part of the plant. Counseling sessions and disciplinary actions with Ketter proved unsuccessful that after the in-plant transfer, Ketter was transferred to another plant. Moreover, the Fifth Circuit ruled that Petitioner's summary judgment evidence *did not contest* the facts concerning the city's handling of Ketter's misbehavior.

The Fifth Circuit also applied the proper standard by finding that Petitioner did not establish a *prima facie* case of discrimination or disparate treatment with respect to promotions. Petitioner failed to produce sufficient evidence of a racial animus with respect to this claim. The appeals court held that Ketter, a co-worker, could not directly influence the decision as to who was trained or promoted. Furthermore, Bernard never passed the required civil service exam to be promoted, and he provided no evidence that his failure was the result of the City denying him training. Nor did Bernard show that other individuals of other races were provided training to pass the civil service exams.

ARGUMENTS SUPPORTING DENIAL OF THE WRIT

I. HOSTILE WORK ENVIRONMENT AND REMEDIAL MEASURES UNDER TITLE VII

A. STANDARD UNDER TITLE VII

How hostile must an atmosphere be, or how severe must the effect be on an employee, to be actionable under

Title VII? In *Meritor,* this Court stated that, to constitute actionable harassment, the conduct must be "sufficiently severe or pervasive to alter the condition's of the victim's employment and create an abusive working environment."[4] After *Meritor,* most courts undertook a dual inquiry: first, would the condition in question be offensive to a reasonable person, and second, what was the actual impact on the individual harassed? As to the latter point, the required effect on the individual was unclear until the court in *Harris*[5] decided the issue.

> "Title VII comes into play before the harassing conduct leads to a nervous breakdown . . . the very fact that the discriminatory conduct was so severe or pervasive that it created a work environment abusive to employees because of their race, gender, religion or natural origin offends Title VII's broad rule of workplace equality."[6]

The Seventh Circuit developed a six step test to analyze harassment cases. These steps are that: (1) the employee belongs to a protected group; (2) the employee was subject to unwelcome harassment; (3) the harassment complained of was based on race; (4) the harassment complained of affected a term, condition or privilege of employment; *(5) the plaintiff must be able to prove that the employer knew or should have known of the harassment and failed to take prompt and remedial action;* and (6) the

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[4] *Meritor Sav. Bank v. Vinson,* 477 U.S. 57, 67 (1986).

[5] *Harris v. Forklift Sys.,* 114 S. Ct. 367, 126 L.Ed.2d 295 (1993).

[6] *Id.* at 114 S. Ct. 367, 372.

employee acted reasonably under the circumstances.[7] This Court confirmed the fact that "mere utterance of an epithet which engenders offensive feelings in an employee does not sufficiently affect the conditions of employment to implicate Title VII. A plaintiff must show that the hostile environment altered the conditions of his/her employment."[8]

B. PROMPT AND REMEDIAL ACTION

Under what conditions will the employer be held responsible for a hostile work environment? It is clear that an employee must do more than merely avoid actively creating a racially, ethnically or sexually intimidating environment.[9] This Court offered some guidance on this issue in *Meritor*.[10] The Court stated that traditional EEOC principles shall be used for guidance. It quoted from the agency's brief in which the Commission suggested an examination of the following factors:

- whether an employer has a policy forbidding harassment;
- whether it has in place a system to respond to complaints of harassment;

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[7] *Daniels v. Essex Group, Inc.*, 740 F.Supp. 553 (N.D. Ind. 1990), *aff'd*, 927 F.2d 1264 (7th Cir. 1991). (Emphasis added). *See also Henson v. City of Dundee*, 682 F.2d 897 (11th Cir. 1982).

[8] *Harris*, 114 S.Ct. at 372.

[9] *See* 29 C.F.R. §§1604.11(c) and 1606.8(c).

[10] *See* N.2 *Supra*. Although this court was asked to rule on employer responsibility, it declined to do so, finding that the record was not well developed on this issue.

- whether the alleged victim availed himself of that system;
- whether the system was reasonably responsive to the complaints; and
- whether the employer had actual notice of the harassment.[11]

If an employer has actual or constructive notice of a racially hostile work environment and fails to take active and effective steps to remedy it, the employer may have violated Title VII. If the employer takes prompt and remedial action, however, he will be relieved of liability.[12]

The Petitioner argues that the Fifth Circuit's ruling in this case removes the employer's obligation to eliminate racial harassment until the victim complains about the harassment. Petitioner goes on to argue that the Fifth Circuit's view gives no duty to the employer to end known harassment. The Fifth Circuit made no such ruling. Petitioner's argument is wholly contrary to the conclusions of the appeals court, district court and the EEOC.

The Fifth Circuit found that a racially hostile work environment may have existed in this case because Ketter "engaged in racially insulting conduct and displayed

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[11] *Meritor*, 477 U.S. at 71, *quoting* Brief for the United States and the Equal Employment Opportunity Commission as *Amici Curiae* at 26.

[12] *Davis v. Monsanto Chem. Co.*, 858 F.2d 345 (6th Cir. 1988), *cert. denied*, 490 U.S. 1110 (1989). The court found that the employer took quick and appropriate remedial measures in response to racially derogatory graffiti, therefore, the employer was not liable for tolerating racial harassment.

materials derogatory of blacks (and religion) in the workplace."[13] But, the court also found that the evidence clearly showed that the managers of the water plant took prompt remedial action when informed that Petitioner found Ketter's conduct offensive. Moreover, the appeal court stated that management's handling of the Ketter situation never suggested that Ketter's offensive conduct was tolerated or excusable. Petitioner's summary judgment evidence,[14] fails to contest the facts concerning the handling of Ketter's misbehavior. The City's uncontroverted actions constituted a prompt remedial response to Bernard's complaints.[15]

The district court also looked very closely at the reaction of the City to Bernard's complaints. It found that in retrospect, Ketter's supervisors should probably have taken decisive action against Ketter in a more expeditious manner, however, ***"they cannot be faulted for taking the course they followed."*** Ketter was afforded every opportunity to improve his behavior; when all the City's efforts failed, he was transferred away from Petitioner within three months of the first complaint, and transferred to

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[13] *Clement Bernard v. City of Dallas*, No. 93-1651, slip op. at 2 (5th Cir. April 7, 1994).

[14] Petitioner's Response to City's Summary Judgment Motion consisted primarily of four Affidavits, all of which discussed the transgressions of Harry Ketter. R. 222. Petitioner provided no evidence which suggests that the City's actions were not reasonable.

[15] *Clement Bernard v. City of Dallas*, No. 93-1651, slip op. at 3 (5th Cir. April 7, 1994).

another plant several months later.[16] The EEOC also investigated Petitioner's complaint and it also found that the City took prompt remedial action and that no additional relief was necessary.[17]

Petitioner's argument that the City, more specifically SSWWTP Management, was aware of the hostile work environment long before Bernard complained is baseless and without merit. Petitioner makes the following conclusory statements:

> "Although plant managers had earlier failed to act on misconduct known to all . . . "[18]

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[16] *Clement Bernard v. City of Dallas*, No. 90-1783, Memorandum Opinion and Order at 11 (N.D. Tex. June 23, 1993). (Emphasis added).

[17] EEOC's Determination Letter specifically stated: The evidence obtained during the investigation substantiates that the work environment was not free from sexual harassment, racially discriminatory literature and drawings, and intimidation. *This was reported to Respondent in October 1988, and Respondent took action to remedy the situation, i.e., the person creating the hostile environment was transferred to another work site.*
Section 706(b) of Title VII requires that if the Commission determines that there is reason to believe that violations have occurred, it shall endeavor to eliminate the alleged unlawful employment practices by informal methods of conference, conciliation, and persuasion. However, since the Respondent undertook remedial action, the Commission, accordingly, *deems that no additional relief is necessary, and the harassment and intimidation issue is hereby considered resolved.* R. p. 86 (Emphasis added).

[18] Petitioner's Petition for Writ of Certiorari, p. 9.

> "The undisputed evidence made clear that management had known about the harassment long before October 1988."[19]

Both these statements are not supported by the record that is before this court. No evidence has ever been presented that SSWWTP Management was ever aware of the actions of Ketter. The Fifth Circuit does state in its decision that Ketter's activity apparently went on for some time, but it never found that management had either actual or constructive knowledge of Ketter's actions. Moreover, Ketter and Bernard only worked together fourteen (14) months prior to Bernard filing his first complaint. No evidence exists that Bernard was a victim of any type of harassment during the early part of this relationship. In fact, the record shows that Petitioner and Ketter voluntarily engaged in acrimonious conversations with each other about various racial, religious and sexual issues. R. p. 221. The record does reflect, however, that once Kilpatrick was made aware of the problems caused mostly by Ketter, he promptly acted to eliminate the hostile environment.

The Fifth Circuit's decision applies the standard recognized by all the circuit courts, that an employer is responsible for acts of harassment in the workplace ***where the employer (or its agents) knows or should have known of the conduct, unless it can show that it took immediate and appropriate corrective action.*** "Every circuit which has addressed this issue has agreed with this standard."[20]

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[19] *Id.*

[20] *Meritor State Bank v. Vinson*, 477 U.S. 57, 67 (Marshall, J., concurring).

Petitioner claims that the Fifth Circuit's decision in this case is expressly rejected by the Fourth and Sixth Circuits. A closer look at the cases cited by Petitioner as being similar to the present case reveals glaring differences. In *Yates*, two female employees filed sexual harassment allegations against their supervisor in the fall of 1983. Evidence was offered to indicate that the supervisor had harassed women as early as 1980, and the employer had notice of the supervisor's tendencies at this earlier date. Three other women had in one way or another, notified management of the supervisor's harassment since 1980.[21]

In *Paroline*, the Fourth Circuit reversed a decision granting motion for summary judgment in favor of the employer because evidence showed that there had been prior complaints to management by other employees about sexual harassment by the individual who victimized the plaintiff. Moreover, the employer only took nominal measures in response to the known harassment.[22]

Both of the cases cited are distinguishable from the present case. No evidence was ever presented by Petitioner that SSWWTP Management was aware of Ketter's actions before October 1988. No evidence was presented

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[21] *Yates v. Avco Corp.*, 819 F.2d 630 (6th Cir. 1987). The court specifically found that the evidence established that Avco knew, or should have known, that the supervisor was sexually harassing the plaintiffs and other females. Moreover, it found that it had a sexual harassment policy that did not function properly. *Id.* at 636.

[22] *Paroline v. Unisys Corp.*, 879 F.2d 100, 106 (4th Cir. 1989).

that they *should* have been aware of Ketter's actions. The only evidence on the record, before this Court is that immediately upon being notified of Ketter's actions, Kilpatrick, Manager of SSWWTP, took action. Initially, counseling sessions, then reprimands against Ketter, then transferring Ketter to a different work group, and then within ten (10) months of Petitioner's first complaint, Ketter's transfer to another location. It is because of these facts that the district court, appeals court, and this Court should find that the City took immediate and appropriate corrective action to eliminate the hostile work environment.

II. PETITIONER FAILS TO ESTABLISH A *PRIMA FACIE* CASE OF RACIAL DISCRIMINATION IN PROMOTIONS UNDER TITLE VII

A. STANDARD UNDER TITLE VII

Under the disparate treatment theory in a Title VII action, existence of a pattern or practice of discrimination must be proved, and such theory requires proof of discriminatory intent, which must be established by either direct or circumstantial evidence.[23] A plaintiff must show that the defendants intentionally treated him unfairly because of his race.[24]

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[23] 42 U.S.C. §2000(e), *et. seq.*

[24] *Valdez v. San Antonio Chamber of Commerce*, 974 F.2d 592, 596 (5th Cir. 1992), *Vaughn v. Edel*, 918 F.2d 517, 521 (5th Cir. 1990).

In a typical disparate treatment case, a plaintiff must prove a *prima facie* case of discrimination by showing that (1) he is a member of a protected group; (2) he was qualified for the job he held; (3) he was discharged; and (4) after his discharge, his employer filled the position with a person who is not a member of the protected group.[25] This case allegedly involves the denial of proper training needed for promotion.

Discrimination in access to training or retraining programs is illegal under a special provision of Title VII,[26] although the same result may well follow from Title VII's more general provisions requiring non-discrimination in all terms and conditions of employment. The issue of discrimination in training usually arises in promotion cases in which an employee contends that he or she was not offered training available to others, or was not given training as good as that given to others, and that discrimination was the reason for the lack of promotion.[27] To

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[25] *McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 802 (1973).

[26] 42 U.S.C. §2000(e)-2(2) states: It shall be an unlawful employment practice for any employer, labor organization, or joint labor-management committee controlling apprenticeship or other training or retraining, including on-the-job training programs to discriminate against any individual because of his race, color, religion, sex, or national origin in admission to, or employment in, any program established to provide apprenticeship or other training.

[27] *Washington v. Electrical Joint Apprenticeship and Training Comm.*, 845 F.2d 710 (7th Cir. 1988), *cert. denied*, 488 U.S. 944 (1988).

show discrimination in training opportunities, the plaintiff must show either he was provided inadequate training because of discrimination, or that training opportunities were given out in a discriminatory manner.[28]

B. NO DENIAL OF TRAINING

Petitioner argues that the decision of the Fifth Circuit conflicts with decisions of other circuits because it allows an employer to deny black workers promotions by not providing the necessary training. Bernard asserts that the Fifth Circuit's decision circumvents Title VII protections based solely on an employee's geographical location. This is not the finding of the Fifth Circuit. Furthermore, there is ample evidence in the record that Bernard was not denied a promotion based upon his race.

Contrary to Petitioner's arguments, the record does not have any evidence, direct or indirect, of statements by Ketter or Petitioner's supervisor that they were determined to prevent any black worker from promoting into a T-9 position. Notably absent in Petitioner's brief are cites to the record of these preposterous findings. Petitioner also exaggerates that Ketter was responsible for providing the needed training in order to be promoted. The Fifth Circuit correctly found that Ketter, a co-worker, could not directly influence the promotional decision. The record does show that Bernard sought promotion from a T-7 Apprentice Instrument Technician to a T-9 Instrument Technician. The T-9 promotion was based

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[28] *Id.*

upon an objective Civil Service Exam. Bernard had knowledge of what was to be covered on the T-9 exam since he took and failed the exam on May 1, 1987, prior to being assigned to work with Ketter. Bernard also took and failed the exam on three other separate occasions. R. p. 99. No evidence exists that these failures occurred while Bernard and Ketter worked together. Moreover, no evidence exists to show that the exams had a disparate impact on minorities.

Petitioner did take and pass the Mechanic Technician T-9 test on November 3, 1988. R. p. 99 (during the time he worked with Ketter). Bernard states that he was tutored by Jessie Beard, Maintenance Supervisor, who is a white male, to prepare for that exam. The fact that Bernard passed this exam with the assistance of a white male demonstrates that the City did not practice racial discrimination in training. Furthermore, Petitioner stated he would not have passed that exam if it had not been for the help of Jessie Beard. R. pp. 81-83.

The evidence, or lack of evidence in this case, which is fatal to Petitioner's argument is the fact that it fails to show that any white employee received training which Petitioner was denied. No evidence exists that Ketter or any other supervisor was training non-minorities to pass

the Instrument Technician T-9 exam.[29] In fact, the only evidence of someone receiving special training was Petitioner in the help he received from Beard to pass the Mechanic Technician exam.

Petitioner fails to make out a *prima facie* case because he never was qualified for an Instrument Technician T-9, having failed the test every time he took it. Moreover, Petitioner provides no evidence to show that a similarly situated non-minority who failed the Instrument Technician T-9 exam was promoted to that position.

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[29] EEOC specifically found the lack of this evidence to be fatal. The EEOC's Determination Letter specifically stated: "The evidence shows that Charging Party received some training, but that training was not formalized. He was denied a two-year college program because of lack of funds. Others of different races were also denied this training. *There is no evidence to support that CP [Bernard] was denied training because of his race, Black.*" R. p. 85. (Emphasis added).

CONCLUSION

None of the issues Bernard presents is of precedential value that warrants review by this Court. Additionally, there is no conflict among the circuits regarding any of the issues presented. The Fifth Circuit meticulously reviewed the facts and applied the correct legal standards in reaching its conclusions. For these reasons stated herein, this Court should deny Petitioner's Petition for Writ of Certiorari.

Respectfully submitted,

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